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No. 96-1190

In The

Supreme Court of the United States

October Term, 1997

WENDY L. KERN,

Petitioner,

vs.

CITY OF ROCHESTER; FIRE DEPARTMENT of the City of Rochester; POLICE DEPARTMENT of the City of Rochester; ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS; DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department; CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the District Court properly grant Respondent Local 1071's motion to dismiss Petitioner's 42 U.S.C. §1985(3) cause of action against Local 1071 and did the Court of Appeals for the Second Circuit properly uphold this determination?

2. Did the District Court properly dismiss Petitioner's 42 U.S.C. §2000e (Title VII) cause of action against Respondent Local 1071 for lack of subject matter jurisdiction, and did the Court of Appeals for the Second Circuit properly uphold such a determination?

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STATEMENT OF THE CASE

A. Statement of Facts

The facts of this case are set forth in the Decisions of the Western District of New York dated November 23, 1993, December 1, 1994 and October 5, 1995 and the Decision of the Court of Appeals for the Second Circuit dated August 15, 1996, and in the interests of brevity respondent respectfully directs the Courts attention thereto. (A. 1-49).

B. Course of Proceedings and Disposition of the Case Below.

Petitioner commenced an action against Respondents on June 28, 1993, alleging violations of 42 U.S.C. §§1983, 1985(3) and 1986 as well as state law, arising out of incidents alleged to have occurred while she was employed as a secretary by Rochester Firefighters Association, Inc., Local 1071, IAFF ("Local 1071"). After stipulating to an extension of time to appear, Local 1071 appeared by Notice of Motion for Summary Judgment, Or In The Alternative To Dismiss, dated August 10, 1993. All other named Respondents similarly moved.

Petitioner opposed the motion and cross-moved under FRCP 15 to amend her complaint to add a claim under 42 U.S.C. §2000e (Title VII).

By Decision and Order dated November 23, 1993, the United States District Court for the Western District of New York, Hon. Michael A. Telesca presiding, granted each of respondents' motions to dismiss and denied petitioner's cross-motion to add the claim for violations of Title VII. (A. 40-49). However, the Court did grant leave for Petitioner to file an amended complaint to include adequate allegations regarding the Court's subject matter jurisdiction over the Title VII claims as against Local 1071 and respondent Cavuoto.

By Notice of Motion dated January 18, 1994, Petitioner moved; (1) to amend her complaint to add a Title VII cause of action; (2) for the Court to reconsider its Decision and Order dated November 23, 1993 and; (3) to supplement the record. In support of her contention that there was subject matter jurisdiction over Petitioners Title VII claims, Petitioner advanced the argument that Local 1071 had more than 15 employees during her employment. Petitioner argued alternatively that she did not have to prove that Local 1071 had 15 or more employees based on its status as a labor union with 15 or more members.

By Decision and Order dated December 1, 1994, the District Court denied Petitioner's Motion in its entirety. (A. 31-39). The District Court properly held that Petitioner was an employee of Local 1071, and not a member of the union. Thus, she sued Local 1071 in its capacity as her employer, regardless of the fact that her employer happened to be a labor union. The District Court held that the determination of the issue of the number of employees for purposes of Title VII subject matter jurisdiction was a question for the Court to resolve, and further ordered that a hearing be held to resolve the jurisdictional issue of whether Local 1071 employed more than 15 employees during Petitioner's tenure.

A hearing was held on August 28, 1995 comporting with all due process requirements. (A. 20). By Decision and Order dated October 5, 1995, the District Court dismissed Petitioner's Title VII claims against Local 1071 for lack of subject matter jurisdiction. (A. 18-30). The District Court further dismissed Petitioner's state law claims under principles of pendent jurisdiction. Specifically, the Court held that Petitioner failed to meet her burden with respect to establishing that Local 1071 had 15 or more employees during the relevant time period. The Court rejected Petitioner's arguments that non-officer Executive Board Members of Local 1071 should be counted as employees, that two independent contractors and the union's attorney be counted as employees, and that the employees

of Respondent, International Association of Firefighter ("IAFF") be counted together with Local 1071's employees under a 'single-entity' theory.

Petitioner's Notice of Appeal dated November 3, 1995 sought review of the Court's Decision and Order dated October 5, 1995, the Judgment dated October 5, 1995 as well as the Decisions and Orders dated November 23, 1993 and December 1, 1994. By Decision and Order dated August 15, 1996, the United States Court of Appeals for the Second Circuit upheld in its entirety the decision of the United States District Court for the Western District of New York. (A. 1-17).

C. Correction of Misstatements in the Petition.

The Decisions of the Western District of New York and the Court of Appeals for the Second Circuit correctly set forth the facts of this case. (A. 1-49). However, pursuant to United States Supreme Court Rule 15.2, Respondent brings the following misstatements of facts contained in the petition to the Court's attention.

1. Petitioner misrepresents to this Court the events of, and subsequent to, the alleged encounter between Petitioner and Lt. Cavuoto. These allegations, plus the allegation that the Rochester Police Department Personnel permitted the "leaking" of Petitioner's complaint to a retired firefighter or the public, are unsupported by the record.

2. Petitioner also misrepresents to this Court that there is a conspiracy among the respondents to quash Petitioner's complaint. Again, both the District and Circuit Courts held that there is no merit to this argument and Petitioner has no evidence to support such an allegation. (A. 1-49).

3. Petitioner also misrepresents to this Court that Lt. Cavuoto conspired to keep certain individuals in their Local 1071 board

positions and to work against Lt. McMenemy in an attempt to circumvent the by laws and constitution. Again these are conclusory allegations for which Petitioner has no evidence.

All of these misstatements are conclusory allegations made by Petitioner which have no support in the Record. In fact, all such claims by Petitioner have been dismissed. (A. 1- 49).

REASONS FOR DENYING THE WRIT

According to Supreme Court Rule 10, a review of a writ of certiorari is not a matter of right, but rather a matter of judicial discretion. However, that rule does set forth a set of criteria which the Court may use in making its decision. Although this is a discretionary matter, this petition contains none of the aforesaid criteria. The decision of the court below is not in conflict with other Courts of Appeals, is not in conflict with any state court decision, and was not decided by a state court. See also, Braxton v. United States, 500 U.S. 344, 347 (1991). What Petitioner is seeking is a re-hearing of both the factual and legal issues that were decided by the courts below after a full hearing on those issues. As stated in Supreme Court Rule 10, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." This is exactly what the Petitioner is basing this petition on, and for that reason and those set forth below this Court should deny the petition.

I

The Court should deny the petition for writ of certiorari because the Decisions of the District Court and Court of Appeals gave full consideration to all of the issues and decided them correctly.

A. The courts below properly held that Petitioner had not pled a valid claim pursuant to 42 U.S.C. §1985(5).

The issue of whether Petitioner had correctly pled a claim pursuant to 42 U.S.C. §1985(3) was fully argued in front of the District Court. (A. 40-49). The Western District Court of New York in a Decision and Order dated November 23, 1993 held that Petitioner had failed to set forth and plead a claim pursuant to 42 U.S.C. §1985(3). *Id*. The Court held that the Petitioner made "no more than conclusory allegation[s] that there was a conspiracy to deprive her of her rights." Therefore, the Court dismissed this claim as against the Respondents. (A. 43 & 44).

This decision of the District Court, as affirmed by the Second Circuit, was in full accord with the caselaw. To properly state a claim under 42 U.S.C. §1985(3), the complaint must allege four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protections of the laws, or of equal privileges or immunities under the laws; (3) that the conspirators committed some act in furtherance of the conspiracy and; (4) that there was either injury to the person or property or deprivation of any right or privilege of a citizen of the United States. Griffen v. Breckenridge, 403 U.S. 88, 102-03 (1971). Finally, in pleading a claim under 42 U.S.C. §1985(3), the plaintiff must set forth in detail the time and the place of the alleged effect of the conspiracy. Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993) (quoting 2A Moore's Federal Practice p 8.17[6] at 8-109 to 8-110 [2d ed. 1992]). In order to sufficiently allege a conspiracy under 42 U.S.C. §1985(3),

the complaint must contain more that mere conclusory allegations. Id. Based upon this law, both Courts correctly held that Petitioner had failed to properly plead with the required specificity all the elements of a 42 U.S.C. §1985(3) claim.

The Western District did hold that Petitioner was free to move for leave to amend her complaint as to correctly plead the §1985(3) claim. However, upon moving to amend, Petitioner's proposed amended complaint did not contain a claim under §1985(3). Instead, the sole claim in the amended complaint was a claim under Title VII. That the Petitioner did not find this claim of enough merit to re-plead that claim supports the determination of the courts below.

Petitioner's claim under §1985(3) would have been dismissed for lack of merit even if it had been correctly plead. An action will lie under §1985(3) when a plaintiff is injured by a private conspiracy bent in interfering with an individuals constitutional rights, only if there is some racial, or perhaps otherwise class-based, individually discriminatory animus behind the conspirators actions. Bray v. Alexandria Woman's Health Clinic, 506 U.S. 263 (1993); Jews for Jesus, Inc. v. Jewish Community Relations Council of N.Y., Inc., 968 F.2d 286, 290-91 (2d Cir. 1992), citing Colombrito v. Kelly, 764 F.2d 122, 130 (2d Cir. 1985) (quoting Griffin at 102). This language has been interpreted to require a claim of discrimination between classes such as that based upon racial bias, national origin or religion. Perrotta v Irizarry, 403 F.Supp. 1274 (S.D.N.Y. 1977), aff'd 573 F.2d 1294 (2d Cir.), citing Hahn v Sargent, 523 F.2d 461 (lst Cir. 1975); Arnold v Tiffany, 487 F.2d 216 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974).

The courts below were correct in dismissing Petitioner's claims as they lack merit. In the case at bar, there is no evidence that any conduct by respondents was aimed at, or for the purpose of denying the petitioner her constitutional rights. Bray, 506 U.S. at 275. This Court has held that the mere fact that an alleged

conspiracy has the effect of a constitutional violation is not enough, the very purpose of the conspiracy must be aimed at denying the protected right. Id.

Petitioner has failed to meet the strict requirements of pleading a viable claim under §1985(3). Petitioner's allegations regarding the alleged conspiracy in general, and specifically as to Local 1071's role, were held to be vague and conclusory attempts to add yet another cause of action against Local 1071. (A. 43-44). In her Petition, petitioner again attempts to persuade yet another Court that there is merit to her §1985(3), where none exists. (Pet. 19-24). The petitioner should not be allowed to have yet a third Court examine this issue.

B. The issue that the District Court lacked subject matter jurisdiction as to petitioner's claim under Title VII was also decided correctly by the Courts below.

This issue has also been fully briefed and argued by the parties. (A. 20). At the District Court, Hon. Michael A. Telesca presiding, a hearing was held to specifically determine whether or not Local 1071 was an employer of fifteen or more employees, thus bringing the union under the jurisdiction of Title VII. (A. 21). After said hearing the District Court in a Decision and Order dated October 5, 1995 correctly held that petitioner's claim under Title VII as against Local 1071 was dismissed since Petitioner had failed to establish that Local 1071 was an employer within the meaning of Title VII (42 U.S.C. §2000e(b)). (A. 18-30). On appeal, the Court of Appeals for the Second Circuit upheld the District Court's decision in a Decision and Order dated August 15, 1996. (A. 1-17).

This Court should not grant certiorari in the case at bar because this issue has also been correctly decided by the courts below. Petitioner attempts to argue that Local 1071 is an employer by arguing on several different fronts. First she argues that Local

1071 is an employer because the union has more than 500 members and therefore it meets the requisite of Title VII. (Pet. 25-26). Next, she argues that Local 1071 has the more than 15 employees as required by the statute. (Pet. 26-27). Finally, she argues that Local 1071 is an agent of the parent International Association of Fire Fighters and that because the IAFF has more than 15 employees this should be imputed to the Local. (Pet. 27-29). All of theses arguments were examined by the Courts below and correctly determined to be without merit. (A. 1- 49).

1. The Courts below correctly held that Local 1071's membership was irrelevant to the issue of whether Petitioner could maintain a claim against Local 1071 in its capacity as an employer under Title VII.

The courts below correctly held that Petitioner sued local 1071 in its capacity as an employer, and not in its capacity as a labor union. (A. 31-39). This is axiomatic since the Petitioner is not a member of the union. 42 U.S.C. §2000e-2(c). Therefore, Petitioner is attempting to argue that the term employee as written in the statute is the same as the term member. Petitioner however, is unable to direct the Court's attention to one single case where such a holding was made. Instead, as she argued at the Court of Appeals level, Petitioner would have this Court adopt the EEOC interpretation of Title VII as outlined in its amicus brief in Yeardon v. Henry, 1996 U.S. App. LEXIS 19872 (2d Cir. 1996). No court, including the Second Circuit in that opinion, has ever accepted the EEOC's interpretation and there is no basis for this Court to make such a holding in the case at bar. In fact, in a recent decision, the Fifth Circuit reasoned, as did the Second Circuit in Yeardon and this case, that the EEOC interpretation would negate the impact of the jurisdictional limitations of Title VII which Congress has explicitly set forth. Greenlees v. Eidenmuller Enterprises, 32 F.3d 197 (5th Cir. 1994).

2. The Courts below were correct in holding that Local 1071 did not as a matter of fact, have 15 employees within the meaning of Title VII.

Petitioner next argues that Local 1071 is an employer pursuant to 42 U.S.C. §2000e(b) because Local 1071 employs 15 or more people. (Pet. 26-27). As the District Court for the Western District of New York correctly noted in its decision and Order dated October 5, 1995, "the term employer is defined in Title VII as 'a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.'" (A. 20, citing 42 U.S.C. §2000e(b)). The Second Circuit was also correct in holding that Title VII defines an employee as "an individual employed by an employer." (A. 16, citing 42 U.S.C. §2000e(f)). In determining whether an individual is an employee under Title VII an examination must be performed to determine if the individual performed traditional employee duties. EEOC v. Johnson & Higgins, Inc., No. 95-6216, 1996 WL 446731, at 12 (2d Cir. 1996); Chavero v. Local 241, 787 F.2d 1154 (7th Cir. 1986); EEOC v. First Catholic Slovac Ladies Ass'n, 694 F.2d 1068 (6th Cir. 1982), cert. denied, 464 U.S. 819 (1983).

Again, a hearing was held to specifically determine this issue. (A. 21). The District Court determined after the hearing that there was *at most* five employees of the Local and that this is insufficient as a matter of law to trigger Title VII protections. (B. 36-37). Therefore, the Court below was correct in holding that Petitioner had failed to establish a viable Title VII claim as against Local 1071.

By its very nature, this is a factual determination which has already been determined by two independent courts. According to the Courts below, petitioner has failed to establish that a traditional employee-employer relationship existed between the eight non-

officer board members of the Local 1071 and the Local 1071 itself, and also as between the three individuals which Petitioner argued were also employees and Local 1071. The courts examined in depth, the duties and responsibilities of each individual which petitioner argued was an employee under Title VII. The courts below determined that the officer board members were employees for Title VII purposes, but that the eight non-board members were not employees thereby removing the Local 1071 from the jurisdiction of Title VII. The Courts below also correctly held that the three non-member individuals, Larry Belkin, John Parrinello, and Sam Corridi were also not employees of Local 1071. These were purely factual determinations that were first made by the District Court and then examined again by the Court of Appeals. There is no reason why Petitioner should get a third attempt to argue that Local 1071 has fifteen employees. (A. 1-30).

3. The Courts below were correct in holding that Local 1071 was not the agent of its parent, the IAFF.

Petitioner also attempts to argue that Local 1071 falls within the meaning of employer because Local 1071 is an agent of the IAFF, under a single entity theory. (Pet. 27-29). This argument was also correctly held to be without merit by both of the courts below.

Under Title VII, if an entity employs less than 15 employees, the "single entity theory" may be utilized to bring in another parent or related entity to increase the number of employees to satisfy the 15 employee requirement. 42 U.S.C. §2000e(b); Shepardson v. Local 410, 823 F.Supp. 1245, 1250 (ED Pa. 1993). In order to determine such an issue however, there must be a factual determination as to the level of control and influence which is exercised by the other entity. Ames v. Whitman Chocolates, 1991 WL 281798, 1991 US Dist. (ED. Pa. 1991). This determination is accomplished via a four-pronged test in which the following elements are considered: (1) the inter-relation of operations, (2) common management, (3) centralized control of labor relations,

and (4) common ownership or financial control. Shepardson v. Local 410, 823 F.Supp. at 1250 (citing Childs v. Local 18, International Brotherhood of Electrical Workers, 719 F.2d 1379 (9th Cir. 1983)).

In Childs v. Local 18, International Brotherhood of Electrical Workers, 719 F.2d 1379 (9th Cir. 1983), a case similar to the one at bar, the 9th Circuit Court of Appeals, as did the court in this case, dismissed a Title VII action against a local union, Local 18, and its international association, The International Brotherhood of Electrical Workers (IBEW) on the grounds that there was no subject matter jurisdiction due to the number of employees of Local 18 and on the basis that the IBEW was not the plaintiff's employer. In upholding the District Court's dismissal, the 9th Circuit held that subject matter jurisdiction could not be shown by the plaintiff under an agency theory; "Although Local 18 is chartered by the IBEW, it conducts its own labor relations, hires and fires employees on its own, elects its own officers, conducts its own collective bargaining and has a separate treasury." Id. 719 F.2d at 1382.

This issue was again addressed in Shepardson v. Local 410, 823 F.Supp. at 1250. The plaintiff in Shepherdson, like the Petitioner in the case at bar, attempted to cast the local union and its international association as a single entity pursuant to traditional agency principles in an effort to meet the subject matter jurisdictional pre-requisites of Title VII. In attempting to circumvent the holding in Childs, the plaintiff in Shepherdson alleged that the International controlled most, if not all, of the aspects of the local's business. The plaintiff in Shepherdson offered portions of the International Union's Constitution as well as proof that the local union members participated in the International's pension plan. In support of its position the Court considered the evidence, but still dismissed the action holding that the proper analysis should focus " . . . on the reality of control, not necessarily the number and structure of the International's

regulations that govern maintenance of a local charter." Shepherdson, 823 F.Supp. at 1256.

Applying this well settled law to the case at bar, it is clear that the District Court, as affirmed by the Second Circuit, was correct in holding that "the IAFF simply did not involve itself in the day-to-day management of Local 1071" and that "the connections between the two entities were insufficient to demonstrate that Local 1071 is an agent of IAFF." (A. 28). While Local 1071 may be required to follow the rules set forth in the International's Constitution it is free to adopt its own procedures in all other respects, including collective bargaining. Local 1071 shares neither a common treasury, common employees, nor common facilities with the IAFF. Thus, the District Court was correct in holding that the Petitioner failed to meet her burden of demonstrating that Local 1071 and the IAFF are a single entity or that Local 1071 was an agent of the IAFF, and the Second Circuit was similarly correct in upholding that decision. Once again, this was a factual determination that was made by the District Court and affirmed by the Second Circuit Court of Appeals which the Petitioner is asking this Court to examine in the vein hope of getting a favorable decision.

II

This Petition should be denied because Petitioner is not seeking an interpretation of the law, but rather Petitioner is seeking to have this Court make decisions of policy which should be left to Congress.

Petitioner also attempts to argue that the issues presented in this Petition are of exceptional importance and that Petitioner and others like her will have no redress as a result of these decisions. This is simply not true. Petitioner currently has a New York State court action pending under Executive Law §292(5). According to that statute, Petitioner, and others like her, only need to

demonstrate that an employer has five or more employees to bring that employer under the jurisdiction of New York employment law. This gives Petitioner, and others like her, a remedy in the state courts, even though there may be no remedy at the federal level.

Petitioner seeks from this Court the creation of a new policy rather than an interpretation of old policy. Therefore, according to Article I, Section 8(18) of the United States Constitution, the issues presented in this case should be determined by Congress and not by this Court. If petitioner is without remedy in this case it is because the American people, through their duly elected representatives of Congress, have drafted the statute not to include small employers under the protections of Title VII. If Congress has determined that certain individuals are without remedy under Federal Law, it is not the province of this Court to create its own statutory scheme to remedy this situation. This would exceed the limits of the Courts power as established in Marbury v. Madison, 1 Cranch 137 (1803).

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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